Leisure Farm Corp Sdn Bhd v Syarikat Kemajuan Kim Yon Sdn Bhd

HIGH COURT (JOHORE BAHRU) — CIVIL SUIT 22-242 OF 1988
ABU MANSOR J
26 JANUARY 1989

Civil Procedure — Injunction — Application for interlocutory injunction — Good faith — Grant or refusal of injunction having practical effect of putting an end to action — Principles applicable — Whether there were serious questions to be tried — Balance of convenience — Whether relevant

The plaintiff applied for an interlocutory order restraining the defendant from selling transferring assigning disposing pledging charging or otherwise dealing with a certain piece of land save pursuant to an order of the court. By an agreement in writing between the plaintiff and the defendant, the defendant agreed to sell the land to the plaintiff for the price of $55,000,000. The price was to be paid by the plaintiff by instalments, which were to be equivalent to 25% of the payments received by the plaintiff as proceeds of sale arising from the plaintiff's sale of individual lots into which the land may be sub-divided, provided that the full purchase price was to be paid within five years from 11 February 1985.

The defendant through their solicitors informed the plaintiff that they were giving notice of termination of the agreement, as the plaintiff had not performed their obligations, and giving as an additional reason the fact that they were winding-up proceedings against the plaintiff. The plaintiff commenced the instant action seeking specific performance of the agreement and damages for breach of contract. The defendant contended that the plaintiff had sold various lots following sub-division but had failed to pay to the defendant a sum equivalent to 25% of the prices received for the lots and had therefore acted in breach of the agreement.

Held, dismissing the plaintiff's application for an injunction:

(1) It is settled law that a party in pursuit of a remedy such as an injunction must have shown utmost faith and disclosed all relevant matters that would affect the court's decision to grant or otherwise refuse the injunction prayed for.

(2) There was some substance in the submission of counsel for the defendant that the plaintiff had not completely come clean as to how much they had received in the form of proceeds of sale of the lots. The plaintiff should have disclosed all these matters and come clean so that the court may decide on the granting of the injunction. The disclosure was necessary for a number of reasons so as to see the extent to which the contract had been performed. It would give the court some indication as to the seriousness of the plaintiff especially in performing the contract.

(3) The principle of trying to gauge whether there were serious questions to be tried should not be applied here. Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice, and to balance the risk of doing injustice to either party. In such a case, the established guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since whatever the strengths of either side, the defendant should not be precluded, by the granting of an interlocutory injunction, from disputing the plaintiff's claim at the trial.

(4) Without the aid of the court's injunction, the plaintiff could still complete the purchase. In the event that the defendant refused to complete the sale, it was still open for the plaintiff to apply for an early hearing of the suit for specific performance and pay the full purchase price, especially in the absence of any action by the defendant applying for a declaration that the agreement was terminated.

Cases referred to

1 *Aberfoyle Plantations Ltd* v *Khaw Bian Cheng* [1960] AC 115 (refd)
2 *James Shaffer Ltd* v *Findlay Durham & Brodie* [1953] WLR 106 (refd)
3 *Decro-Wall International SA* v *Practitioner In Marketing Ltd* [1971] 1 WLR 361 (refd)
4 *Woodar Investment Development Ltd* v *Wimpey Construction UK Ltd* [1980] 1 All ER 571 (refd)
5 *Pertama Cabaret Nite Club Sdn Bhd* v *Roman Tam* [1981] 1 MLJ 149 (refd)
6 *Daiman Development Sdn Bhd* v *Mathew Lui Chin Teck* [1981] 1 MLJ 56 (PC) (refd)
7 *British & Benington Ltd* v *NW Cashar Tea Co Ltd* [1923] AC 48 (refd)
8 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 (distd)
9 *Cayne & Anor* v *Global Natural Resources plc* [1984] 1 All ER 225 (folld)

Legislation referred to

Specific Relief Act 1950 s 11

K Balaguru for the plaintiff.
YK Loh (*Darryl SC Goon* with him) for the defendant.

Cur Adv Vult

Abu Mansor J: By their summons-in-chambers application dated 17 July 1988, the plaintiff/applicant applied for an order restraining the defendant by themselves or their servants or agents or otherwise howeversoever from selling transferring assigning disposing pledging charging or otherwise dealing with land held under CT 3202 lot no 679 mukim Pulai, EMR 746 and 747 for lots 7 and 8 mukim Pulai, CT 20245 and 20246 for lots 1141 and 1514 mukim Tanjung Kupang save pursuant to an order of this court and the usual application for costs. After hearing both parties in open court, I exercised my discretion and I dismissed this application with costs to be taxed. I now give my reason for coming to that decision.

This application is supported by the applicant's affidavit of Abdul Majid bin Othman, the director of the plaintiff company sworn on 19 September 1988 (3A). From the affidavit, we discovered the following facts. The defendant is the registered proprietor of the lands stated in the application, roughly of some 1,700 acres of land as set out in para 6 thereof.

On 11 February 1985, the plaintiff and defendant entered into an agreement whereby the defendant agreed to sell the said lands to the plaintiff free from encum-

brances and with vacant possession for the consideration and upon the terms and subject to the conditions in the agreement. The purchase price was $55,000,000 and shall be paid as follows:

(a) The purchaser shall pay the purchase price of $55,000,000 by instalments. Each instalment shall be 25% of the payments received by the purchaser as proceeds of sale arising from the purchaser's sale of individual lots into which the said land may be approved for sub-division, provided that the full purchase price shall be paid to the vendor within five (5) years from 11 February 1985. (Reference is made to cl 2 para 1 of 'AMBO 1'.)

(b) Until the full purchase price shall have been paid the purchaser shall forthwith pay to the vendor 25% of each payment received by the purchaser as proceeds of sale of such individual lots and each of such payment to the vendor shall be part payment to account of the purchase price. (Reference is made to cl 3(b) p 2.)

Under the agreement, the plaintiff was to develop the land under the style of Leisure Farm and the plaintiff was to develop and sell each individual lot forming part of the land and the plaintiff was to notify the vendor of the amount received from purchasers of the lot.

The plaintiff has agreed to obtain the approval of the Foreign Investment Committee of the Prime Minister's Department and, by letter dated 23 December 1986, the secretary of the Foreign Investment Committee informed the plaintiff they have no objection towards the proposal.

It was also a term of the agreement that the plaintiff was to obtain the approvals of all the relevant government authorities for any planning and layout, subdivision and/or conversion. The approval of the state executive council of Johore was, at the time of affirming the affidavit, obtained recently and a director of the defendant company had, pursuant to cl 12(b), signed the documents required by the Pengarah Tanah dan Galian Negeri Johore. Up to that date, the plaintiff say they have done all and sundry required of them in respect of obtaining government approval. The plaintiff also had spent some $2,000,000 in performing their obligation and they are still ready and willing to comply with the agreement.

However, by two letters both dated 7 July 1988, the defendant through their solicitors informed the plaintiff that the defendant was giving notice of termination to the plaintiff as the plaintiff had not performed their obligations and giving as an additional reason, the winding-up of the plaintiff. The plaintiff replied explaining the real situation and refuted the defendants' unsubstantiated allegations. The plaintiff said the defendant not only threatened but have indicated in clear terms that they have terminated the agreement.

If the agreement was terminated, the defendant would have all the benefits of the agreement at a time when the plaintiff had got all the required approvals and was set to complete their performance of the contract. A termination of the agreement would cause wrongful loss to the plaintiff which cannot be compensated in damages.

Hence the plaintiff has filed an action in this court praying for specific performance of the agreement and damages for breach of covenant. In aid of the action, the plaintiff applies for this injunction.

Mr Balaguru for the plaintiff/applicant contended that there has been no breach of the sale agreement by the plaintiff. He strenuously refuted the defendant's allegation in their reply encl (7) - the reply to the plaintiff's affidavit-in-support encl (3A). In particular, plaintiff's counsel referred to the mode of payment of the purchase price as stated in exh CKY-1 cl 2. The plaintiff submitted that on a proper reading of the said cl 2 thereof, the plaintiff is obliged to pay the $55m purchase price by instalments with no minimum amount and with no number of instalments stated but the purchase price to be paid in full in five years. The plaintiff is to pay the defendant 25% of the payments received from any purchaser as the proceeds of sale of sub-divided lots. The plaintiff submitted that the approval for sub-division was only obtained in July 1988. The plaintiff says there has been no sale yet of lots. The plaintiff says there is therefore no necessity of notifying the defendant.

The plaintiff conceded that acting under cl 13 of the agreement, the plaintiff may demarcate the property. The plaintiff, joined by the vendor, can sell the demarcated land. On the defendant's contention that the plaintiff had been receiving proceeds of sale, as in exh CKY-5 (38 booking pro formas), the plaintiff's counsel refuted the allegation of the defendant that by looking at the booking pro forma CKY-5 (38 of them) there had been sales of the demarcated lots. No doubt, although the first twelve have endorsed on them 'we accept the above booking', there is an absence of such endorsement/acknowledgement by the plaintiff from the thirteenth to thirty-eighth. Plaintiff's counsel says when payment is made, acknowledgement is signified by a chop and the signature. He says if the original were to be produced then the court would be able to see how many have paid. Plaintiff's counsel, however, submitted that all the bookings are not sale. Even if the booking pro formas are to be construed as sale by the plaintiff, counsel submitted that the plaintiff, under cl 2 of CKY-1, has until 1990 to pay up. Plaintiff's counsel cited the case of *Aberfoyle Plantations Ltd* v *Khaw Bian Cheng*[1] which decided that if a date for completion is fixed, then that date given must be adhered to. In regard to the plaintiff's obligation to pay, plaintiff's counsel cited 9 *Halsbury's Laws of England* p 377 which states that a party is not bound to answer before time whether he intends to

fulfil or not. The plaintiff says this is relevant to the defendant's allegation in para 3(i) and 3(ii) of CKY-9 (encl (7)). The plaintiff's answer was as there was no sale, there was therefore no profit made and nothing to notify.

The plaintiff submitted that there was also indecision on the part of the defendant as, on 7 July 1988, the defendant terminated the agreement (CKY-2). On 18 August 1988 in 'AMBO 7' (encl (12)), the defendant pleaded on behalf of the plaintiff that the quit rents for the golf field be reviewed in order not to be a burden to the plaintiff. The plaintiff submitted that the defendant, after having affirmed the contract by conduct (AMBO-7), is now attempting to rescind, giving repudiation as the reason. In para 18 of encl (3A), the plaintiff has stated the defendant has knowledge (denied by the defendant) that the state authority had given approval of the project. Plaintiff's counsel submitted that as regards the onus, it is for the party seeking to terminate the contract to prove the existence of the facts which justify the exercise of his contractual right to terminate. He cited *Chitty on Contracts* (25th Ed) Vol 1. Plaintiff's counsel submitted that from the facts as disclosed in the affidavit, the defendant has failed to discharge the burden.

On the question of the correct interpretation of the proceeds of sale, the plaintiff's stand was that 'proceeds of sale' was to mean proceeds of sale including after sale, whereas the defendant disagrees. The plaintiff submits that it cannot constitute repudiation of the contract as the plaintiff was giving a certain interpretation to the terms of the contract. See *James Shaffer Ltd* v *Findlay Durham & Brodie*[2] where it was held in the circumstances of that case that the conduct of the distributors did not evince a clear intention not to be bound by the contract. Plaintiff's counsel says they had no intention to repudiate the contract as the final approval by the state authority was only given in July 1988. Even assuming there was breach it did not go to the root, and it has yet to be determined whether there has been a breach. He cited *Halsbury's Laws of England* p 370 para 538 and also *Decro-Wall International SA* v *Practitioner In Marketing Ltd*[3] where the court held there was no breach by the defendant when they failed to pay punctually.

Plaintiff's counsel submitted that the plaintiff, being the innocent party, did not accept the defendant's repudiation. The plaintiff did this since it is possible that an unjustified rescission may amount to repudiation and therefore the plaintiff claims against the defendant. He cited *Woodar Investment Development Ltd* v *Wimpey Construction UK Ltd*.[4] The plaintiff also observes that the defendant in their pleadings has abandoned their counterclaim for rescission and seems only to claim surplus breach of contract and damages that does not justify termination.

On the other hand, the plaintiff claims specific performance under the Specific Relief Act 1950, s 11(b) and (c). Counsel submitted there were serious questions to be tried. In the circumstances he submitted that the defendant could not resist an injunction just because the contract is burdensome to perform. The plaintiff cited *Pertama Cabaret Nite Club Sdn Bhd* v *Roman Tam*[5] where it was held that the court saw no reason to allow a convenantor who was clearly in breach to have a holiday from enforcement of his obligation.

Mr YK Loh, counsel for the defendant, in reply said that the letter CKY-2 dated 7 July 1988 must be viewed in the light of the facts known then and in the possession of the defendant as on that date. The action of the defendant must also be looked at in the light of the facts existing at that date. The defendant was only aware of the facts stated in para 2 of the said letter, ie approval from the Foreign Investment Committee and approval for sub-division had not been obtained. In addition, a petition for a company winding up was being applied against the plaintiff arising out of a writ of seizure and sale obtained, leaving a substantial sum unpaid. The defendant could not be blamed and was rightly concerned a to the plaintiff's solvency.

Then defendant's counsel says there was the plaintiff's letter AMBO-5 (3A). This letter was dated 15 July 1988. Plaintiff's solicitor was seeking to reply to the letter of 7 July 1988. It must be noted that it was only in AMBO-5 dated 15 July 1988 that the defendant was made aware of the progress of the matter and given a picture that perhaps the plaintiff had done something to honour their obligation under the agreement.

Then, as stated in paras 7 and 8 of the defendant's affidavit encl (7), the defendant learned through their own sources that the plaintiff had distributed pro formas to sell sub-divided lots to intending purchasers. The defendant was in possession of 38 such pro formas, 12 of them duly signed by the plaintiff and in the absence of any notification from the plaintiff, the defendant has no knowledge of how much the plaintiff had actually received in respect of the parcels of land. In the defendant's view the pro formas were binding sales and he cited the case of *Daiman Development Sdn Bhd* v *Mathew Lui Chin Teck*[6] where it was held that a party was clearly held bound by the pro forma and cannot argue that it did not create an obligation to purchase and to sell. The defendant's counsel urged the court to see that the terms of the pro forma in that case and the terms of the pro forma in our present case CKY-5 are similarly also subject to present conditions. Defendant's counsel cited a number of other cases in which *Daiman*'s case[6] had been affirmed. Defendant's counsel submits it is not true that there has been no sale. It is also not true to say that proceeds of sale are profits. The plaintiff says it was a term of the agreement that as long as the plaintiff sells,

the plaintiff has to account 25% of the sale to the defendant. It was also a term that if at the end of five years there is no sale, then the plaintiff pays $55m. If the plaintiff makes a sale, then the plaintiff pays 25% of that money to the defendant and under cl 3(b) such payment has to be paid forthwith. The transaction in CKY-3 took place in July 1985. From then, three years have lapsed. As the plaintiff had not accounted anything, and when cl 3 is read with cl 14 that time being of the essence, defendant's counsel submitted that the plaintiff had committed a breach of the agreement. The defendant submitted further that as the plaintiff had not performed his part of the bargain, the affected party can avoid the contract at the instance of the promisee.

The defendant's counsel also urged the court to observe the chronology of events. On 7 July 1988 the defendant sent the plaintiff the letter of intention to terminate and on 15 July 1988 the defendant replied. Subsequent to that, the defendant discovered that the plaintiff had signed booking pro formas. On 16 August 1988, the defendant sent letters terminating the agreement; see CKY-8 and CKY-9.

As regards the petition for the winding up of the plaintiff which was struck out, the plaintiff was obviously unable to pay its debts. Subsequent to this the defendant discovered that the plaintiff had signed pro formas. If *Daiman*'s case[6] was followed, it is not that distant a possibility that the purchasers would be filing caveats to the land. The letter CKY-8 was written as the defendant was anxious of their rights. Defendant's counsel cited *Chitty on Contracts* Vol 24 at p 697 para 1478 which says: 'It is well established, however, that if one party alleges a breach of contract for the wrong reason or for no reason at all, he may yet justify his action if there was at the time facts in existence which would have provided a good reason.'

In the event, it is said that on 7 July 1988 the defendant had no reason to terminate the agreement. Then the defendant discovered that the plaintiff had signed booking pro formas which had the meaning of sales and in consequence the plaintiff had breached the agreement. Defendant's counsel submitted that the defendant had now been furnished with grounds for terminating the agreement. He cited *British & Beningtons Ltd* v *NW Cachar Tea Co Ltd.*[7]

On these available facts before me, I considered whether I should grant the injunction prayed for, bearing in mind it is a discretionary remedy to be exercised by me following judicial principles.

It is settled law that a party in pursuit of such a remedy must have shown utmost faith having disclosed all relevant matters that would affect my decision to grant or otherwise refuse the injunction prayed for.

First, I find there was some substance in the submission of counsel for the defendant that the plaintiff has not completely come clean as to how much they have received in the form of proceeds of sale. In this I make a decision that even a part payment of purchase price represents proceeds of sale and under the terms of the agreement signed between the parties, 25% of it must be paid to the defendant 'forthwith'. In the words of counsel for the defendant, they stumbled on this when preparing for the affidavit in reply (7), else no one would have been the wiser that 38 booking pro formas had been filled by intending purchasers and 12 of them had been accepted by the plaintiff. The plaintiff should have disclosed all these matters and come clean so that the court may decide on the granting of the injunction. This disclosure was necessary for a number of reasons to see to what extent the contract has been performed. It would give the court some indication as to the seriousness on the part of the plaintiff especially in performing the contract.

I also find substance in the submission of the defendant's second counsel that the principle of the *American Cyanamid* case[8] of trying to gauge whether there are serious questions to be tried should not be applied here.

He submitted that these are circumstances special to the facts of this case and the matter must be decided according to the exception to the *American Cyanamid*[8] principle. He cited *Cayne & Anor* v *Global Natural Resources plc*[9] where it was held that where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice, and to balance the risk of doing injustice to either party. In such a case, the established guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply, since, whatever the strengths of either side, the defendant should not be precluded, by the granting of an interlocutory injunction, from disputing the plaintiff's claim at the trial.

Applying the above principle of this case, I also considered the submission of the defendant's counsel relating to the special facts peculiar to this case. I paid regard to the defendant's counsels' plea that if the court were to give the injunction, the agreement had only one year and three months to run before the plaintiff has to pay the full amount of the purchase price. The trial of the plaintiff's action with possible appeals by either side may easily take more than one year and three months and by that time the parties would have resolved this matter. If the plaintiff pays the $55m by that time then the issues will become academic. On the other hand, if the plaintiff fails to pay then the contract would have come to an end under cl 7 of the sale and purchase agreement. If the court were to grant the injunction and the plaintiff does not complete the

agreement by paying the $55m, it would also work unjustly on the defendant by having to obey the injunction after the lapse of one year and three months. The plaintiff could then hold the seven lands in tandem even though that period had elapsed and they still had not got to the stage of approval for sub-division when it had one year and three months to run. The court should not shut its eyes to the present slow-down in the property market. The plaintiff's hope of parcelling and selling the parts in one year and three months in view of the slow-down is slim.

On the other hand, the ball is certainly at the plaintiff's feet. Without the aid of the court's injunction, the plaintiff can still complete the purchase. In the event that the defendant refuses to complete, it is still open to the plaintiff to apply for an early hearing of this suit for specific performance and pay the full purchase price, especially in the absence of any action by the defendant applying for a declaration that the agreement be terminated. In the event this takes place, the obtaining of the injunction is therefore an exercise in futility.

For the reasons given and having considered the justice of the case, I exercised my discretion by refusing the injunction sought by the plaintiff. The plaintiff's application was dismissed with costs to be taxed.

Application dismissed.

Solicitors: *AK Lee & Co; Mah-Kok & Din.*

Reported by *PS Ranjan*

Shell Malaysia Trading Sdn Bhd v Pemungut Duti Setem, Johore Bahru

HIGH COURT (JOHORE BAHRU) — ORIGINATING MOTION NO 32-6 OF 1988
ABU MANSOR J
7 JANUARY 1989

Revenue Law — Stamp duty — Instrument of lease of land — Lump sum consideration — Whether sum is either rent or is fine or premium — Whether instrument attracting stamp duty as for an instrument of a conveyance for the sum — Stamp Ordinance 1949, Sch 1 item 49(1)(a) & 49(1)(b)

The applicant was the lessee of a piece of land under an instrument of lease. The respondent contended that the stamp duty payable on the instrument under the Stamp Ordinance 1949 was equal to the stamp duty for an instrument of conveyance on the ground that the instrument was a lease or an agreement for a lease in consideration of a fine or premium and without rent under Sch 1 item 49(1)(b) of the Ordinance. The applicant contended that the instrument came under Sch 1 item 49(1)(a) of the Ordinance as a lease or agreement for a lease without a fine or premium when the average rent was at a certain amount. The applicant, not agreeing with the stamp duty imposed, brought an appeal to the High Court by way of case stated.

The lease was for a period of 30 years and it was a term of the lease that the lessee was to pay the lessor the sum of $135,000 constituting 30% of the total rental upon execution of the lease agreement and the balance of the total rental in the sum of $315,000 upon registration of the lease agreement. It was a term of the lease that the lease may be determined before the expiration of the 30-year period upon the happening of certain events. It was also a term of the lease that in the event of an earlier determination of the lease, there would be a proportionate refund of the amount paid by the lessee to the lessor commensurate with the unexpired portion of the term of the lease.

Held, allowing the applicant's appeal:
Since the lease agreement contained provision for earlier determination of the lease upon the happening of certain events and there was also provision for proportionate refund of the lump sum paid, the lump sum was rent and not premium. Since the lump sum was rent, the instrument was therefore excluded by the terms of Sch 1 item 49(1)(b) of the Ordinance. For the lump sum to be under Sch 1 item 49(1)(b), it must be without rent. Since the lump sum was rent, it could not therefore be premium or fine. As the lump sum was not a premium or fine, the instrument was therefore an instrument of lease or agreement for lease of land or other immovable property granted or made under item 49(1)(a) without fine or premium.

Cases referred to
1 *Nixon* v *Doney* [1961]SR (NSW) 311 (folld)
2 *Frazier* v *Commissioner of Stamp Duties* (NSW) (SC) NSW-85 ATS 4735 (folld)

Legislation referred to
Stamp Ordinance 1949 s 39, Sch 1 items 49(1)(a), 49(1)(b)

Reginald Vallipuram for the applicant.
Abdul Karim bin A Jalil (Senior Federal Counsel) for the respondent.

Cur Adv Vult